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No. 96-1429

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

PENN ADVERTISING OF BALTIMORE, INC.,
Petitioner,

v.

MAYOR AND CITY COUNCIL
OF BALTIMORE CITY, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Date: April 9, 1997

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MOTION FOR LEAVE TO FILE BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2 of the Rules of this Court, the Washington Legal Foundation (WLF) respectfully moves for leave to file the attached brief as *amicus curiae* in support of Petitioner. Counsel for Petitioner has consented to the filing of this brief. Counsel for Respondents has declined to consent to the filing of the brief, thereby necessitating the filing of this motion.

WLF is a nonprofit public interest law and policy center with supporters in all 50 states. While WLF engages in litigation in a variety of areas, WLF devotes a substantial portion of its resources to protecting the right of commercial free speech. To that end, WLF has appeared before this Court as well as other federal and state courts in cases raising commercial speech issues. *See, e.g., 44 Liquormart, Inc. v. Rhode Island,* 116 S. Ct. 1495 (1996); *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585 (1995); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993); *Peel v. Attorney Registration and Disciplinary Comm'n of Illinois,* 496 U.S. 91 (1990). WLF also filed a brief in support of the certiorari petition filed by Petitioner the last time this case came before the Court. *Penn Advertising of Baltimore, Inc. v. Mayor and City Council of Baltimore City,* 116 S. Ct. 2575 (1996) (*petition granted, vacating and remanding* 63 F.2d 1318 (4th Cir. 1995)).

WLF is concerned that the Fourth Circuit's rationale in this case, if followed widely by lower courts and other circuits, could lead to widespread denial of commercial speech rights. The Fourth Circuit's approach to the third and fourth prongs of the *Central Hudson* test not only upheld a content-based ban on expression, but did so without even a minimal opportunity for Petitioner to engage in discovery and to present evidence.

WLF has no direct interest in the outcome of this case, other than an interest in establishing the principle that the First Amendment rights of commercial speakers should be broadly construed. Accordingly, WLF believes that it brings to the case a perspective that differs from that of any party, and that its brief will be of assistance to the Court in deciding this case.

For the foregoing reasons, *amicus curiae* Washington Legal Foundation respectfully requests that it be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

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April 9, 1997

QUESTION PRESENTED

Amicus curiae will address the following question only:

Whether a restriction on truthful, non-misleading commercial speech may be upheld where the reviewing court asked only whether the legislature could have found a "logical nexus" between the restriction's means and ends, and made no independent inquiry into whether the restriction either would in fact materially advance its goal or was narrowly tailored to do so.

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INTERESTS OF *AMICUS CURIAE*

The interests of *amicus curiae* Washington Legal Foundation (WLF) are set out fully in the Motion for Leave to File accompanying this brief.

STATEMENT OF THE CASE

In the interests of brevity, WLF hereby incorporates by reference the Statement contained in Petitioner's brief.

In brief, Baltimore City in 1994 enacted an amendment to its zoning law (the "Ordinance") which bans (with numerous exceptions) outdoor advertising of cigarettes in most areas of the city. The Ordinance's stated purpose is to reduce illegal smoking by minors. Exempted from the ban are, among other locations, the windows and exteriors of retail outlets licensed to sell cigarettes and the exteriors of public buses, taxicabs, and cigarette delivery trucks. Petition Appendix ("Pet. App.") 84a-92a. Nor does the Ordinance limit other forms of advertising commonly used for cigarettes (*e.g.*, television, radio, newspapers, and magazines).

Petitioner Penn Advertising of Baltimore, Inc. (a company engaged in the business of displaying outdoor advertising) filed suit in 1994 seeking, *inter alia*, a judgment that the Ordinance violates its First Amendment rights to engage in commercial speech and is preempted by § 5(b) of the Cigarette Labeling and Advertising Act. 15 U.S.C. § 1334(b).[1]

On August 11, 1994, the U.S. District Court for the District of Maryland granted summary judgment to Respondents. Pet. App. 15a-47a. Although the parties sharply disputed the purpose of the Ordinance (an issue central to Petitioner's federal preemption claim) and the

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[1] Section 1334(b) provides that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of . . . cigarettes."

relationship between cigarette advertising and consumption (an issue central to Petitioner's First Amendment claim), the district court treated the Ordinance's statement of purpose as conclusive and the relationship between advertising and smoking as "self-evident." The district court held (despite evidence to the contrary submitted by Petitioner) that the Ordinance would materially advance Respondents' (referred to herein collectively as "Baltimore City") goal of reducing smoking by minors, finding that courts may properly "defer to a legislative judgment that advertising increases consumption." *Id.* at 21a. The district court also rejected Petitioner's federal preemption argument and its argument that the Ordinance was insufficiently narrowly tailored, and denied Petitioner's request for discovery prior to decision. *See id.* at 6a.

On appeal, the U.S. Court of Appeals for the Fourth Circuit affirmed. Pet. App. 3a-14a. *Penn Advertising I.* Relying on its decision in a companion case that addressed a First Amendment challenge to a similar ordinance that banned most outdoor advertising of alcohol beverages in Baltimore,[2] the Fourth Circuit held that the Ordinance could be upheld in the face of First Amendment challenge without the need to look beyond the findings made by the Baltimore City Council when it adopted the Ordinance. The appeals court held that the Ordinance's restrictions on commercial speech survived scrutiny under the third prong of this Court's *Central Hudson* test because Baltimore City "reasonabl[y]" believed that the Ordinance would reduce underage smoking. The court also found that the Ordi-

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[2] *Anheuser-Busch, Inc. v. Mayor and City Council of Baltimore City [Anheuser-Busch I]*, 63 F.3d 1305 (4th Cir. 1995), *cert. granted, judgment vacated*, 116 S. Ct. 1821, *on remand*, 101 F.3d 325 (4th Cir. 1996).

nance survived *Central Hudson*'s fourth prong -- that the Ordinance be "not more extensive than is necessary" to serve the stated governmental interest -- because the alternatives suggested by Petitioner (including increased enforcement of the ban on sales to minors) would not serve to screen minors from outdoor cigarette advertising. *Id.* at 12a-13a.

Following the Court's decision in *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495 (1996), the Court granted Petitioner's petition for a writ of certiorari, vacated the Fourth Circuit's judgment, and remanded the cases to the Fourth Circuit for reconsideration in light of *44 Liquormart*. Pet. App. 15a.

On remand, the Fourth Circuit (by a 2-1 vote) "re-adopt[ed]" its prior opinion and again affirmed the district court's dismissal. Pet. App. 1a-2a. *Penn Advertising II*. In a one-paragraph opinion, the appeals court stated, "[W]e conclude that *44 Liquormart* does not require us to change our decision in this case," for the reasons stated in *Anheuser-Busch I*, as modified by *Anheuser-Busch, Inc. v. Mayor and City Council of Baltimore City [Anheuser-Busch III]*, 101 F.3d 325 (4th Cir. 1996).[3]

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[3] The only significant difference between *Anheuser-Busch I* and *Anheuser-Busch II* concerned this Court's decision in *Posadas v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986). *Anheuser-Busch I* had relied heavily on *Posadas*, but *44 Liquormart* called into question *Posadas*'s continued viability by questioning the *Posadas* Court's willingness to defer to legislative judgments regarding the scope and effectiveness of commercial speech restrictions. In light of *44 Liquormart*'s criticism of *Posadas*, the appeals court stated in *Anheuser-Busch II* that it was no longer relying on *Posadas* in deciding to uphold the Ordinance. *Anheuser-Busch II*, 101 F.3d at 327 n.*.

The appeals court distinguished *44 Liquormart* by arguing that that case involved a far more extensive speech restriction. The court noted that Baltimore had banned only one form of alcohol advertising and one form of cigarette advertising (billboards in most areas of the city) and had targeted only those individuals prohibited from purchasing such products, while in *44 Liquormart* Rhode Island had banned alcohol price advertising "in any form whatsoever" and had targeted *all* consumers including "legal users." *Anheuser-Busch II,* 101 F.3d at 328. The appeals court also held that Baltimore's focus on protecting children and juveniles served to distinguish its commercial speech restrictions from the law struck down in *44 Liquormart* because this Court has "repeated[ly] recogni[zed] that children deserve special solicitude in the First Amendment balance because they lack the ability to assess and analyze fully the information presented through commercial media." *Id.* at 329. The court held that the commercial speech restrictions actually fostered First Amendment values because "far from undermining the free dissemination of information to independently choosing consumers, Baltimore's ordinance supports the full development of its young so that they will be able to assess their market options intelligently and independently." *Id.*

Finally, the Fourth Circuit also attempted to distinguish *44 Liquormart* by arguing that the ordinances qualified as "time, place, or manner" speech restrictions because they permitted outdoor advertising of tobacco and alcohol beverages at some locations and because they permitted manufacturers to advertise their products via other media. *Id.*

Judge Butzner dissented from the panel's decision; he would have remanded the case for an evidentiary hearing.

Pet. App. 2a. Judge Butzner argued that the courts could not, in the absence of a fully developed factual record, determine whether the Ordinance could survive scrutiny under the third and fourth prongs of the *Central Hudson* test. *Anheuser-Busch II*, 101 F.3d at 330-32.

REASONS FOR GRANTING THE WRIT

I. THE FOURTH CIRCUIT'S DEFERENTIAL APPROACH TO COMMERCIAL SPEECH RESTRICTIONS IS UNTENABLE AFTER *44 LIQUORMART*

The burden is on the government to justify regulation of commercial speech that concerns a lawful activity and is not misleading. *Edenfield v. Fane,* 113 S. Ct. 1792, 1800 (1993). A municipality must: (1) demonstrate a substantial interest in support of its regulation; (2) demonstrate that the regulation advances that interest "in a direct and material way"; and (3) demonstrate that the regulation is narrowly tailored -- *i.e.*, that the restriction on commercial speech "is in reasonable proportion to the interest[] served." *Id.* at 1798. As the Fourth Circuit correctly recognized, the dispute in this case revolves around whether Baltimore has proper justification for its Ordinance under the latter two of those factors -- commonly known as the third and fourth prongs of *Central Hudson*'s four-prong standard of review for commercial speech.[4]

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[4] As noted above, Petitioner has also raised a federal preemption challenge to the Ordinance. While WLF supports granting certiorari on the preemption issue as well, this brief focuses solely on why certiorari should be granted to address Petitioner's First Amendment claims.

The Fourth Circuit, in determining in *Penn Advertising I* that the Ordinance met the *Central Hudson* test for the restriction of commercial speech, stated:

> There is a *logical nexus* between the City's objective and the means it selected for achieving that objective, and it is not necessary, in satisfying *Central Hudson*'s third prong, to prove conclusively that the correlation exists, or that the steps undertaken will solve the problem. . . . The proper standard for approval must involve an assessment of the *reasonableness* of the legislature's *belief* that the means it selected will advance its ends.

Pet. App. 13a (quoting *Anheuser-Busch I*, 63 F.3d at 1314-15)(emphasis added). On this basis, the Fourth Circuit refused to consider even the barest contrary evidence that Petitioner submitted.

In interpreting *Central Hudson*'s standard as one requiring only a "logical nexus" and a "reasonable belief" that the means will directly and materially advance the end, the Fourth Circuit reduced the *Central Hudson* test from one of "intermediate scrutiny" to one of mere "rational basis" review, as evidenced by its refusal to even look at contrary, compelling evidence. Such an approach flies in the face of this Court's pronouncements regarding the proper review of commercial speech regulations: the legislature is required to "demonstrate that the harms it recites are real and that a restriction will in fact alleviate them to a material degree." *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1592 (1995)(quoting *Edenfield*, 113 S. Ct. at 1800). *See also Ibanez v. Florida Dep't of Business & Professional Regulation*, 114 S. Ct. 2084, 2089 (1994).

Any doubt about the exacting standard of review required for commercial speech restrictions was eliminated by *44 Liquormart*. Indeed, *Anheuser-Busch I*'s deferential standard of review was derived almost entirely from *Posadas*, a decision effectively overruled in pertinent part by *44 Liquormart*. As Justice Stevens (writing for himself and Justices Kennedy, Thomas, and Ginsburg) explained in *44 Liquormart:*

> Our commercial speech cases recognize some room for the exercise of legislative judgment. *See Metromedia, Inc. v. San Diego,* 453 U.S. 490, 507-508 (1981). However, Rhode Island errs in concluding that *Edge* [*United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993)] and *Posadas* establish the degree of deference that its decision to impose a price advertising ban warrants. . . .
>
> Because the 5-to-4 decision in *Posadas* marked such a sharp break from our prior precedent, and because it concerned a constitutional question about which this Court is the final arbiter, we decline to give force to its highly deferential approach.
>
> Instead, in keeping with our prior holdings, we conclude that a state legislature does not have the broad discretion to suppress truthful, nonmisleading information for paternalistic purposes that the *Posadas* majority was willing to tolerate.

44 Liquormart, 116 S. Ct. at 1511. Justice O'Connor (writing for four other Justices) agreed. *Id.* at 1522. There is no allegation that Petitioner's advertising contains anything other than truthful, nonmisleading information; Baltimore City seeks to suppress it solely because of the

City's belief that minors would be better off not being exposed to it. Accordingly, the Fourth Circuit clearly erred in *Penn Advertising I* and *II* when it concluded that Baltimore City's "reasonable belief" that the Ordinance would directly and materially advance the goal of reducing smoking by minors was sufficient to immunize the Ordinance from attack under the *Central Hudson* test's third prong.

The Fourth Circuit's analysis of *Central Hudson*'s fourth prong was equally faulty. The appeals court simply refused to consider Petitioner's suggested alternatives for achieving Baltimore City's goals, alternatives that did not involve regulating speech. Pet. App. 13a-14a. Justifying that refusal required significant judicial sleight-of-hand; where previously the City's legislative goals had been identified as reducing smoking by minors, now the goal was identified as "curbing the enticement" for underage drinking and smoking. *Anheuser-Busch I,* 63 F.3d at 1316 (incorporated by reference in *Penn Advertising I,* Pet. App. 13a-14a). Obviously, the only way to curb enticements is to suppress speech; such suggested alternatives as stricter enforcement of the underage sales ban almost surely (as the Fourth Circuit conceded) would reduce underage drinking and smoking, but the Fourth Circuit deemed the alternatives insufficiently comparable to the Ordinance because they would do nothing to curb *enticements* for underage drinking and smoking. *Id.* However, Baltimore City has never identified as its legislative goal a desire to eliminate truthful, nonmisleading speech because such speech constitutes an enticement to minors to smoke cigarettes. Rather, Baltimore City's goal has been to reduce underage smoking, and thus Petitioner was improperly prohibited from discovering and presenting evidence that the goal

could be equally well achieved without resorting to speech restrictions.

The Fourth Circuit attempted in *Penn Advertising II* to bolster its initial decision by suggesting (by reference to its opinion in *Anheuser-Busch II*) that First Amendment scrutiny be relaxed when commercial speech restrictions are designed for the protection of children. The appeals court stated:

> This decision thus conforms to the Supreme Court's repeated recognition that children deserve special solicitude in the First Amendment balance because they lack the ability to assess and analyze fully the information presented through the commercial media.

Anheuser-Busch II, 101 F.3d at 329.

Even if the panel is correct that there exists a "special solicitude in the First Amendment balance" that permits otherwise impermissible speech restrictions to be imposed in the name of child welfare,[5] that conclusion does not obviate the need for courts to subject all commercial speech

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[5] WLF notes that the Court has declined other invitations to reduce, in certain classes of cases, the exacting level of review normally applied to commercial speech restrictions. The Court has declined, for example, to relax the level of review when the product being advertised is alleged to constitute a vice. *See Rubin v. Coors Brewing Co.*, 115 S. Ct. at 1590-91 n.2; *44 Liquormart*, 116 S. Ct. at 1513 (Stevens, J.). Moreover, the Court has rejected broad commercial speech bans even when their purpose was to protect children from the speech, noting that under the First Amendment the "government may not reduce the adult population . . . to reading only what is fit for children." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 73-74 (1983).

restrictions to the four-pronged analysis set forth in *Central Hudson.* A speech restriction is not immunized from judicial review based simply on legislative assertions that the restriction will materially advance the cause of child welfare; *44 Liquormart* makes clear that, when challenged, government regulators must demonstrate that their speech restrictions materially advance their stated objective (regardless how noble the objective) and do so in a narrowly tailored manner. The cases cited by the appeals court -- which deal almost exclusively with FCC broadcast restrictions -- lend no support to the panel's contention that close scrutiny of speech restrictions is unnecessary when the government is seeking to protect children.

Penn Advertising II's analysis of *44 Liquormart* makes little sense when one considers that Rhode Island, as does Maryland, prohibits the purchase of alcohol beverages by those under 21 and the purchase of cigarettes by minors. The Court was willing to accept Rhode Island's contention that a price advertising ban leads to *some* reduction in consumption (albeit not necessarily a *material* reduction), *44 Liquormart,* 116 S. Ct. at 1509, and by extension presumably would also have accepted a contention that a price advertising ban serves to reduce consumption among all age groups, including those under 21. Yet, it is difficult to believe that the unanimous *44 Liquormart* court would have reversed its decision if Rhode Island had merely announced that its price advertising ban was designed to reduce underage drinking. Accordingly, Baltimore City's expressed goal of protecting choldren does not serve to distinguish this case from *44 Liquormart*; at the very least, *44 Liquormart* requires that Petitioners be permitted an opportunity to gather and present evidence that the Ordinance will not materially advance the cause of child welfare and is not narrowly tailored to achieve that goal.

The straying of the Fourth Circuit from this Court's commercial speech review standards is not unique and thus merits plenary review. Since *Central Hudson,* lower courts have exhibited some confusion regarding the third and fourth prongs and the requisite level of judicial review. The Ninth Circuit has applied a relatively strict level of review in such cases. *Nordyke v. Santa Clara County,* ___ F.3d ___, 1997 U.S. App. LEXIS 6303 (9th Cir. 1997). The Fifth and Tenth Circuits, on the other hand, appear to share at least some of the Fourth Circuit's willingness to grant the legislative branch considerable deference in commercial speech cases. *Dunagin v. City of Oxford, Miss.*, 718 F.2d 738, 747 (5th Cir. 1983), *cert. denied,* 467 U.S. 1259 (1984); *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d 490 (10th Cir. 1983), *rev'd on other grounds sub nom. Capital Cities Cable, Inc. v. Crisp,* 467 U.S. 691 (1984).

The deferential approach to commercial speech restrictions has reached its nadir here. The Fourth Circuit's summary dismissal of Petitioner's First Amendment challenge to a regulation of protected commercial speech is apparently without precedent. WLF therefore respectfully urges this Court to grant certiorari for purposes of clarifying how the lower courts should exercise the scrutiny required under *Central Hudson* and how governments seeking to regulate commercial speech can meet the burden of proof imposed by *Central Hudson.*

II. THE ORDINANCE MAY NOT BE DEFENDED AS A "TIME, PLACE, OR MANNER" RESTRICTION ON SPEECH, BECAUSE IT IS NOT CONTENT-NEUTRAL

In *Penn Advertising II* and *Anheuser-Busch II,* the Fourth Circuit attempted to shore up its analysis by asserting for the first time that Baltimore City's commercial speech restrictions are valid as "time, place, or manner" restrictions on speech. Pet. App. 2a (incorporating, *Anheuser-Busch II,* 101 F.3d at 329). That assertion is without merit; the Ordinance does not qualify as a "time, place, or manner" speech restriction because it is not content-neutral, and this Court has never indicated a willingness to import into commercial speech cases the deferential standard of review employed in "time, place, or manner" cases when examining legislative findings.

The Court has explained "time, place, or manner" speech restrictions as follows:

> [T]he government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of information.

Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting *Clark v. Community for Creative Nonviolence,* 468 U.S. 288, 293 (1984).

Regardless whether Baltimore City could demonstrate that it can meet the second and third requirements of a

valid "time, place, or manner" restriction on speech (narrow tailoring and alternative channels for communication), Baltimore clearly cannot meet the content-neutrality requirement. The Ordinance is not content-neutral under any commonsense definition of that term: it prohibits some outdoor signs and permits others based solely on their content. The Fourth Circuit thought that the Ordinance qualified as a time, place, or manner restriction because Baltimore City does not altogether ban outdoor advertising of cigarettes but rather limits the number of places where such signs can be posted; and also because Baltimore City permits advertising of cigarettes through other media. Pet. App. 27a (incorporating *Anheuser-Busch II,* 101 F.3d at 329). But in the absence of evidence that Baltimore City imposes similar "place" restrictions on commercial signs advertising other types of products, the Ordinance cannot be said to be "content-neutral" and thus cannot be upheld as a "time, place, or manner" restriction.

Indeed, the Court rejected a very similar "time, place, or manner" argument in *Linmark Assoc. Inc. v. Township of Willingboro,* 431 U.S. 85 (1977). *Linmark* involved an ordinance prohibiting the display of "for sale" signs on the front lawns of private residences. The Court held that the ordinance could not be defended as a "time, place, or manner" speech restriction because the municipality did not prohibit display of other types of signs on front lawns -- and thus the ordinance failed the content-neutrality requirement. *Linmark,* 431 U.S. at 93-94.

In their various briefs in this case, Respondents have cited to several of the Court's "time, place, or manner"

decisions and "*O'Brien* content-neutral" decisions[6] to support the Fourth Circuit's contention that the courts should defer to legislative findings regarding the effectiveness of commercial speech restrictions in furthering the legislature's goals. *See, e.g.*, Respondents' *Anheuser-Busch* Brief at 7 (*citing Turner Broadcasting System, Inc. v. FCC [Turner I]*, 512 U.S. 622 (1994)). But the Court has never indicated that the deference afforded legislatures in cases involving "time, place, or manner" speech restrictions or "*O'Brien* content-neutral" restrictions has any place in cases involving content-based commercial speech restrictions. Indeed, in an "*O'Brien* content-neutral" decision issued just last week, the Court repeatedly emphasized that the substantial deference it was affording to congressional findings regarding the cable television industry would not have been granted had the speech restrictions at issue not been content-neutral. *Turner Broadcasting System, Inc. v. FCC [Turner II]*, ___ U.S. ___, 65 U.S.L.W. 4209, 4211 (March 31, 1997); *id.* at 4222 (Stevens, J., concurring)("If this statute regulated the content of speech rather than the structure of the market, our task would be quite different."); *id.* at 4222-23 (Breyer, J., concurring in part). Respondents' reliance on *Turner I* misses the mark for the additional reason that *Turner I* deferred to legislative findings to a far lesser extent than did the Fourth Circuit in this case. The Fourth Circuit held that Respondents were entitled to summary judgment even before Petitioner was given a complete opportunity to gather and present

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[6] In "*O'Brien* content-neutral" decisions, the Court has held that a content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests. *See United States v. O'Brien*, 391 U.S. 367, 377 (1968).

evidence. By way of contrast, despite ruling that substantial deference should be afforded the congressional findings at issue, *Turner I* vacated a judgment against those raising First Amendment challenges and remanded the case to permit them to engage in additional factfinding.

In sum, the Fourth Circuit's invocation of the "time, place, or manner" doctrine as an additional ground for upholding the Ordinance is a significant misapplication of that doctrine. The Court should grant the petition for certiorari in order to correct that error.

CONCLUSION

Amicus curiae Washington Legal Foundation respectfully requests that the Court grant the Petition.

Respectfully submitted,

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Dated: April 9, 1997